CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Appeal No. ST/30269/2019

(Arising out of Order-in-Appeal No.HYD-SVTAX-HYC-APP-050-18-19 (APP-I) dt.21.01.2019 passed by CC & CT (Appeals-I), Hyderabad)

M/s Deccan Shoppe Pvt Ltd,
Plot No. 620, Road No. 33, Jubilee Hills,
Hyderabad, Telangana – 500 033 **......Appellant**

VERSUS

Commissioner of Central Tax – Hyderabad - GST
GST Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004 **......Respondent**

Appearance

Shri K. Chandra Sekhar, Consultant for the Appellant.
Shri L.V. Rao, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30577/2019

Date of Hearing: 30.09.2019
Date of Decision: 30.09.2019

[Order per: P.V. SUBBA RAO.]

1. This appeal is filed against Order-in-Appeal No. HYD-SVTAX-HYC-APP-050-18-19 (APP-I) dated 21.01.2019.

2. Heard both sides and perused the records. The appellant herein had filed a refund claim before the Dy. Commissioner of Customs who, by the Order-in-Original No. 51/2018 (R) dated 18.09.2018, sanctioned it partly and rejected it to the tune of Rs.7,07,894/- on the ground that the same is hit by time bar. Aggrieved, the appellant appealed to the first appellate

authority who, rejected the appeal and upheld the order of the original authority. Hence this appeal.

3. The brief facts of the refund claim narrated in the Order-in-Original were as follows:

a) On 16.10.2017, the assessee paid an amount of Rs.7,73,803/- (Rs.7,65,785/- + Rs.8,018/-) to discharge their service tax liability for the return period of April 2017 to June 2017 and it is the last return of service tax regime.

b) Later it has come to the knowledge of the assessee that there is a balance amount of Rs.15,00,000/- lying in their cash account which was already paid on 17.05.2016 vide Challan No.00178/17.05.2016. They have discharged total tax liability and filed all ST-3 returns up to the period of March 2017 (i.e., up to 2016-17).

c) The assessee has discharged service tax liability of Rs.7,92,106/- for the return period of April 2017 to June 2017 by utilizing the available cash balance of Rs.15,00,000/- and filed the ST-3 return. After discharging the said liability the assessee is still having a balance of unutilized amount of Rs.7,07,894/- in their cash account.

d) Hence the assessee has applied for refund of unutilized balance amount of Rs.7,07,894/- and for an amount of Rs.7,73,803/- which were paid vide challan Nos.50020 dated 16.10.2017 and 50022 dated 16.10.2017.

4. Of the total refund claim for an amount of Rs.14,81,697/- an amount of Rs.7,07,894/-, being the amount deposited by them through challans but which has not been utilized by them, has been rejected, as the application for refund was filed beyond one year from the date of such deposit. In their appeal before the first appellate authority the appellant claimed that they had paid service tax twice on the same amount and hence they were entitled to refund of the same. The first appellate authority in the impugned order held "Therefore, appellant's claim in this appeal seeking remedy on

the ground that they were entitled to refund of the amount paid for the second time on 03.04.2017 under Challan No.10426, being unaware of the earlier payment of service tax made on 17.05.2016, is a new plea which has no basis in the impugned order. In consequence, the instant appeal filed by them cannot be considered to have been made in relation to the claim of refund made before the original authority and which has been rejected by him." Thus, wholly the first appellate authority rejected the appeal.

5. Learned consultant for the appellant submits that the amount which they have claimed as refund pertains to the unutilized amount of service tax which has been deposited by them through a challan but which has not been utilized towards payment of service tax in their ST-3 returns as has been recorded correctly by the original authority. He would submit that their application for refund was rejected on the ground that refund claim was filed beyond one year from the date of the challan through which the amount was deposited. He would submit that the limitation of one year under section 11B should not apply to their case because they have not paid service tax but only deposited some amount which they could have utilized towards payment of service tax and were not able to do so. On a specific query from the bench whether section 11B applies to their case or otherwise, he would submit that section 11B should apply to all refunds including the refunds of deposits made towards utilization of service tax or excise duty. He draws the attention of the bench to clause (b) to the proviso to sub-section (2) of section 11B which deals with the exceptions to the provisions of unjust enrichment. This proviso reads as follows:

> *"**Provided** that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the appellant, if such amount is relatable to –*
>
> *a) ----------------*
>
> *b) Unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;"*

6. He would submit that section 11B applies to even cases where the amounts have been deposited and have not been utilized. When asked as to why the limitation under section 11B should not apply to them when the

section itself applies and if they could pick and choose parts of the section which would apply to them and parts which do not, learned consultant submits that the entire section 11B applies to their case in total. However, a period of limitation of one year has to be reckoned from the relevant date. As per the explanation to section 11B the relevant date is defined as follows:

"(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty."

7. He would submit that in the above cases deposit of amounts have not been specifically covered and hence they fall in the case of "in any other case, the date of payment of duty". In this case, the duty or service tax has

not yet been paid as the deposit of an amount towards service tax or excise is not reckoned as payment of duty. It is only when such deposit is appropriated towards payment of duty, it will amount to payment of duty and that date is the relevant date. It is in the nature of deposit made which is lying unutilized in the account current. Therefore, the relevant date for reckoning the one year time period has not yet begun in their case. Therefore, their application for refund was fully within the period of one year. Therefore, they are entitled to refund of the amount so deposited.

8. Per contra, learned departmental representative submits that the first appellate authority has correctly rejected their appeal before him against the order of original authority as new grounds were raised before him, which are not part of the decision of the original authority at all. Therefore, the appeal may be rejected.

9. I have considered the arguments on both sides and perused the records. It is not in dispute that the application of refund was rejected to the extent of Rs.7,07,894/- on the ground of time bar. It is also not in dispute that this pertains to an amount deposited vide challan dated 17.05.2016 and the application for refund was filed beyond one year from the date of this challan. It is also evident that the appellant had raised some other grounds before the first appellate authority which are not part of the decision in the Order-in-Original rejecting their appeal. On this ground, the first appellate authority has rejected the appeal.

10. The questions to be considered in this case are as follows:

1) Whether the deposits made through challans which have not been utilized towards payment of duty can be claimed as refund under section 11B
2) Whether in such cases, the provisions of section 11B apply in toto or otherwise and
3) What is the relevant date of reckoning the time limit in such cases?

11. As can be seen from clause (b) to proviso to sub-section (2) of section 11B unspent advance deposits lying in balance in applicant’s current account

are covered by section 11B. Once they are covered by section 11B it is not open for anyone to pick and choose which portion of section 11B applies to them and which does not. The entire provisions of section 11B apply in the absence of any specific clause indicating otherwise. The next question is the relevant date for reckoning the time limit in such cases, which has been defined in the explanation to section 11B. Clause (f) of this explanation covers the present case i.e., "in any other case, the date of payment of duty". Since the date of payment of duty has yet to begun in case where an amount has been deposited only in the account current but has not been utilized towards payment of service tax, the relevant date has not yet begun in this case. Consequently, application for refund is within the time limit and hence, needs to be sanctioned.

12. In view of the above, the appeal is allowed with consequential relief, if any.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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